82-950

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

ALICE MADELEINE LABORDE,

Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN G. SOBIESKI,
LADA S. MARX,
Sixteenth Floor,
700 South Flower Street,
Los Angeles, Calif. 90017,
(213) 629-4200,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

The Questions Presented for Review.

1. When a Title VII plaintiff has proved a *prima facie* case, can the employer rebut it without introducing evidence that its action had been based on a non-discriminatory reason? (If the employer can do that, it will seriously weaken enforcement of Title VII.)

In the case at bench uncontradicted evidence showed that the University's practice, when it considered a person for promotion to full professor, was (a) that evaluations of the person's work and recommendations as to promotion be made by specified individuals and bodies; (b) that such evaluations and recommendations, when completed, be delivered to the Chancellor; (c) the Chancellor then makes the University's final decision as to whether or not the person be promoted.

The record shows (i) the Chancellor did not testify; (ii) the evaluations and recommendations which were before him at the times he denied petitioner's promotion to full professor were not introduced into evidence; (iii) the Court of Appeals affirmed a judgment in favor of the University.

2. Is it sufficient, as held by the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1381 (1980) that a Title VII plaintiff prove by a "preponderance of the evidence" that the employer's stated non-discriminatory reason was a "pretext" or, as held by the Ninth Circuit in the case at bench, must the Title VII plaintiff, to prove "pretext," carry the burden of proving that the employer's stated reason was "unreasonable?" (The Ninth Circuit's holding weakens enforcement of Title VII by increasing the Title VII plaintiff's burden of proof.)

The meaning of "unreasonable," as used in the case at bench, is shown by the trial Court's Finding X which stated:

> "I cannot say the University's determination that Professor Laborde's scholarship as inadequate was *unreasonable*. This court is reluctant to substitute its judgment for the academic experts in the field, *no matter how impressive her scholarly work appears to the court*." (Emphasis ours. If that is the law, how can a Title VII plaintiff *ever* prove pretext against a University?)

3. Is it erroneous, as held by the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1383 (Footnote 2) (1980) for the trial court, in deciding the issue of pretext, to give "deference" to the University's stated nondiscriminatory reason, or, is it proper to do so, as held by the Ninth Circuit in the case at bench? (The Ninth Circuit's holding weakens enforcement of Title VII by increasing the Title VII plaintiff's burden of proof).

4. Is a Title VII plaintiff entitled to access to the defendant University's records on which its challenged decisions purportedly rest, when the University claims its evaluations of plaintiff's scholarly work are bases for its refusals to promote plaintiff?

The Fourth Circuit (*Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581, cert. den. 434 U.S. 91) (1977) and Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-1385) (1980) upheld such right of access. Petitioner, in the case at bench, was denied such access. (The Ninth Circuit's decision, by denying a Title VII plaintiff access to such crucial evidence weakens enforcement of Title VII).

TABLE OF CONTENTS

	Page
The Questions Presented for Review	i
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	2
Argument	6
1. The University Did Not Rebut Laborde's Prima Facie Case. It Did Not Introduce Evidence That It Denied Laborde's Promotions for a Legitimate Non-Discriminatory Reason	6
2. The Conflict Between the Fifth Circuit's Holding That a Title VII Plaintiff Can Prove "Pretext" by a "Preponderance of the Evidence" and the Ninth Circuit's Holding, in the Case at Bench, That She Must Prove the Employer's Stated Reason to Be "Unreasonable" Should Be Resolved in Favor of the Fifth Circuit's Holding	7
3. The Conflict Between the Fifth Circuit Holding in Jepsen v. Florida Board of Regents (610 F.2d 1379, 1383 (Footnote 2) 1980) That It Is "Erroneous" for a Trial Court to Give "Deference" to a University's Stated Non-Discriminatory Reason for Its Action and the Holding by the Ninth Circuit, in the Case at Bench, That it Is Proper to Do So, Should Be Settled in Favor of the Fifth Circuit's Holding. If the Ninth Circuit's Holding Is Permitted to Stand, It Will Weaken Enforcement of Title VII by Making It More Difficult for a Plaintiff to Prove Pretext	9

Page

4. The Ninth Circuit's Decision, in the Case at Bench, Denied Laborde Access to the University's Records on Which Its Refusals to Promote Her to Full Professor Were Purportedly Based. Such Decision Conflicts With Decisions in the Fourth Circuit (Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 Cert. Den. 434 U.S. 91 (1977) and the Fifth Circuit (Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1384-1385 (1980)) Which Upheld Such Right of Access. The Conflict Should Be Reversed in Favor of the Decisions of the Fourth and Fifth Circuits. The Ninth Circuit's Decision, by Denying a Title VII Plaintiff Access to Crucial Evidence, Weakens Enforcement of Title VII 11

Summary 14

Conclusion 15

INDEX TO APPENDICES

Page

Appendix A. First Opinion of the Court of Appeals. (April 22, 1982) ..... App. p. 1

Appendix B. Final Opinion of the Court of Appeals. (As Modified September 3, 1982) 8

Appendix C. Order Denying Laborde's Petition for Rehearing as to First Opinion (September 7, 1982) With Dissenting Opinion (September 7, 1982) 15

Appendix D. Order Construing Laborde's September 17, 1982 Petition for Rehearing as to the Second Opinion as a Motion to Reconsider and Denying Such Motion. (October 18, 1982 17

Appendix E. District Court's Findings of Fact and Conclusions of Law. (May 19, 1980) 18

Appendix F. Judgment of the District Court. (May 22, 1980) 33

TABLE OF AUTHORITIES

Cases — Page

Jepsen v. Florida Board of Regents, 610 F.2d 1379 (1980) ..... i, ii, 7, 9, 10, 11, 12, 15

Keyes v. Lenoir Rhyne College, 552 F.2d 579, Cert. den. 434 U.S. 91 (1977) ..... ii, 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7, 9, 10, 12, 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7, 10, 12, 15

Therese Ballet Lynn v. The Regents of the University of California, 656 F.2d 1337 (1981) 13

Statutes

Civil Rights Act of 1964, Title VII (42 USC § 2000e et seq.) ..... i, ii, 2, 7, 9, 10, 11, 12, 14, 15

28 United States Code, Sec. 1254(1) 2

Official Publications

United States Commission on Civil Rights — Clearinghouse Publication No. 74. November 1982, p. 59: "Unemployment and Underemployment Among Blacks, Hispanics, and Women." 15

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

ALICE MADELEINE LABORDE,

Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The first opinion of the Court of Appeals, April 22, 1982, (Appendix A, *infra*) is reported at 674 F.2d 1323-1327 (withdrawn from bound volume). The final opinion of the Court of Appeals, as modified September 3, 1982 (Appendix B, *infra*) is reported at 686 F.2d 715-719. The September 7, 1982 order denying petitioner's Petition for Rehearing as to the first opinion and suggestion for rehearing *en banc*, and dissenting opinion (Appendix C, *infra*) is reported at 686 F.2d 719-720. The order construing the petitioner's September 17, 1982 Petition for Rehearing as to the Modified Opinion as a Motion for Reconsideration, and denying such motion (Appendix D, *infra*) is not reported.

Jurisdiction.

The Judgment of the Court of Appeals was entered on April 22, 1982 and modified on September 3, 1982. On September 7, 1982 the petitioner's timely Petition for Rehearing and suggestion for rehearing *en banc*, as to the April 22, 1982 opinion was denied. On October 18, 1982 petitioner's timely Petition for Rehearing as to the Court of Appeals' September 3, 1982 Modified Opinion and suggestion for rehearing *en banc* was construed as a Petition for Reconsideration and denied. This Petition for Certiorari is filed within 90 days of September 7, 1982. This Court's jurisdiction is invoked under 28 United States Code Sec. 1254(1).

Statute Involved.

42 U.S.C. Sec. 2000e-2(a)(1) states:

> "(a) It shall be an unlawful employment practice for an employer
>
> (i) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Statement of the Case.

Alice Madeleine Laborde, (Laborde) an associate professor since 1974, sued the Regents of the University of California (the University) under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). Her complaint (C.R. 1)[1] alleged that the University had had a long

---

[1] "C.R.," "R.T.," and "Ex" refer, respectively, to the Clerk's Record, Reporter's Transcript, and Exhibits, of the trial court proceedings filed in the Court of Appeals.

standing practice of unlawful employment discrimination on the basis of sex and national origin; as part of such practice the University, commencing in 1974, had refused to promote her to full professor.

The University's answer (C.R. 14) denied unlawful discrimination. At the trial it claimed it had denied Laborde promotion because it considered her scholarship inadequate. (Finding X, C.R. 49).

At the trial Laborde introduced statistical and other evidence which proved, among other things, a *prima facie* case of sex discrimination. (Conclusion of Law 6, C.R. 49).[2] Laborde also introduced evidence which, the court found, showed that a majority of the outside scholars, whom the University had engaged to evaluate Laborde's work, had recommended, in 1978-1979, that Laborde be promoted to full professor. (Finding IX, C.R. 49). The actual majority for Laborde's promotion was 7 to 1.[3]

---

[2] "The statistical evidence presented here establishes a *prima facie* case. The evidence established a shortage of women with respect to the numbers on the faculty, academic rank, promotion to tenure, and salaries . . . . in the light of these statistics it would appear that the employment policies followed by the University may unwittingly achieve an unlawful discriminatory result."

(Conclusion of Law 6, C.R. 49) Uncontradicted evidence showed, among other things, that from the founding of the Irvine campus in 1966, until 1977-1978, a total of 101 persons had been promoted to full professor; 99 were men, 2 were women. (Ex. 40, in evidence R.T. 187).

[3] Laborde testified that her Department Chairman had given her copies of such 8 evaluations, with the evaluators' names deleted. The University did not object to their introduction into evidence. (R.T. 110-117). Excerpts, clearly showing such 7 to 1 majority for Laborde, are as follows:

"Ex. 82. 'Certainly there are many full professors in excellent universities in this country who have not accomplished half as much as Prof. Laborde.'

Ex. 83. '. . . . the range and quality of her various studies would make her very suitable for promotion to a full professorship.'

Ex. 84. '. . . . Mrs. Laborde proves to have a real mastery . . . which has given her, on the international scene, a well deserved reputation as a scholar.'

(footnote continued on following page)

At the trial the University did not offer any testimony by a scholar in Laborde's field (18th Century French Literature) as to the quality of Laborde's scholarship. Instead it introduced evidence that it had a "process" whereby the qualifications of a person being considered for promotion to full professor were reviewed by various bodies and officials; that such process provided that the records of such reviews, and the recommendations of the reviewers, be forwarded to the Chancellor; the Chancellor then decided whether or not the person should be promoted.[4]

Executive Vice Chancellor McGaugh described the University's rules for promotion to full professor. He expressed the opinion that they were fair and protected those seeking promotion. He testified that the "process of review" for Laborde was conducted in accordance with the University's rules. The trial court overruled Laborde's lawyer's objection that

---

Ex. 86. 'Her activity as a scholar seems important to me and the problems she raises are often new. . . . I would give great confidence to Mrs. Laborde.'

Ex. 88. 'It is my opinion that she deserves promotion to full professor.'

Ex. 89. 'Professor Laborde's most recent text *Diderot et l'Amour*, is more derivative than her earlier monographs, but I do not see this as reasons for refusing such promotion.'

Ex. 90. This reviewer did not recommend promotion.

Ex. 91. 'Alice Laborde's exceptional attainments and promise for continued growth as a scholar and critic should eminently qualify her for promotion to Full Professor.' "

[4]Executive Vice Chancellor James T. McGaugh testified (uncontradicted)

". . . . the decision of the chancellor . . . is completely crucial" (R.T. 255) ". . . . [If] the chancellor takes a view which is [contrary to a recommendation] the chancellor is obligated to communicate that difference so that they have an opportunity to provide additional information before the chancellor makes a final decision." (R.T. 261-262).

> "The record is not in evidence [it] is the best evidence of this. We have no independent way of finding out if this is in fact true or not, totally hearsay." (R.T. 241).

The Chancellor did not testify. The University did not introduce any *evidence* of the Chancellor's reasons for denying Laborde promotion to full professor. The papers and recommendations which were before the Chancellor, at the times he denied Laborde promotion to full professor, were not introduced into evidence.

The judicial record, in the case at bench, accordingly, does *not* show the *Chancellor's* reasons, or lack of reasons, for his refusals to promote Laborde to full professor. The District Court's Findings and Conclusions that the University's refusals to promote Laborde were because it considered her scholarship inadequate are, therefore, unsupported by the record.

Finding X (C.R. 49) that

> "the collective academic judgment of the University that plaintiff lacked . . . . excellence in research and scholarship"

is likewise unsupported by the record, for an additional reason. Because the records before the Chancellor at the times he refused to promote Laborde to full professor are not in evidence, the judicial record does not show whether the Chancellor's refusals agreed with the recommendations before him or whether he decided contrary to the recommendations, after having afforded an opportunity to those making the recommendations to present additional evidence. (See footnote 4, page 4, *supra*).

ARGUMENT.

1. The University Did Not Rebut Laborde's Prima Facie Case. It Did Not Introduce Evidence That It Denied Laborde's Promotions for a Legitimate Non-Discriminatory Reason.

(a) Because (i) the Chancellor did not testify and (ii) the records which were before him at the times he denied Laborde promotion to full professor were not introduced into evidence, there is *no* evidence in the record that the Chancellor's decisions, denying Laborde promotion to full professor were based on legitimate, non-discriminatory reasons.

(b) The Court of Appeals' Modified Opinion (Appendix B, *infra*) was erroneous when it argued that the University had rebutted Laborde's *prima facie* case

> ". . . . by offering evidence that Laborde was repeatedly denied promotion to full professor because she failed to meet the University's standards for scholarship and research." (Appendix p. 12).

Such argument erroneously ignores the following material facts. (i) As set out on page 3, *supra*, Laborde's complaint (C.R. 1) alleged that sex discrimination was the University's *actual* reason for such denials. (ii) The trial court's finding that Laborde had proved a *prima facie* case, being unlimited, applied to the earlier denials of promotion as well as to the later ones; (iii) the Chancellor did not testify as to his reasons for such denials; (iv) the records before the Chancellor at the times he made such denials are not in evidence; (v) there is, accordingly, *no* evidence in the record that the Chancellor's earlier denials of Laborde's promotion were, in fact, based on a conclusion that her scholarship was inadequate.

(c) The law is settled that a *prima facie* case can be rebutted *only* by evidence.

"An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by an argument of counsel." (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 footnote 9 (1981)).

2. The Conflict Between the Fifth Circuit's Holding That a Title VII Plaintiff Can Prove "Pretext" by a "Preponderance of the Evidence" and the Ninth Circuit's Holding, in the Case at Bench, That She Must Prove the Employer's Stated Reason to Be "Unreasonable" Should Be Resolved in Favor of the Fifth Circuit's Holding.

(a) In *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (1980), the Fifth Circuit Court of Appeals, in reversing a judgment in favor of a university held:

> "*Board of Trustees v. Sweeney*, 439 U.S. at 24-25 . . . . expressly sanctioned the use of the *McDonnell Douglas* standards in Title VII cases against universities. . . . By requiring that Dr. Jepsen prove 'an abuse of discretion' the district court has placed on her a much greater burden than that approved by the Supreme Court as applicable to Title VII cases." (610 F.2d at 1382-83).

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) confirms with approval, that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973) holds that a Title VII plaintiff may prove pretext "by a preponderance of the evidence." (450 U.S. p. 253).

(b) In the case at bench, however, the district court by requiring Laborde to prove the University's claim as "unreasonable" placed on her a much greater burden than the "preponderance of the evidence" standard approved by this Court as applicable to Title VII cases. What the district

court meant by "unreasonable" is made clear by its Finding X (C.R. 49):

> "I cannot say that the University's determination that Professor Laborde's scholarship as inadequate was *unreasonable*. This Court is reluctant to substitute its judgment for the academic experts in the field, *no matter how impressive her scholarly work appears to the Court.*" (Emphasis ours).

This clearly means that that court will *never* find a university's claim that a woman's scholarship was defective to be a pretext "no matter how impressive her scholarly work appears to the Court."

(c) The Court of Appeals, in affirming the judgment based on such basic finding, misstated such finding, in crucial particulars, adverse to Laborde.

(i) The opinions ignored the fact that Finding X (C.R. 49) found that Laborde had not proved the University's determination concerning Laborde's scholarship was "unreasonable." Instead the opinion made the material misstatements that the district court had found "that the University could reasonably have decided. . . ." (Appendix p. 6) ". . . . the University reasonably decided. . . ." (Appendix p. 14).

(ii) The opinions omitted Finding X's (C.R. 49) crucial statement that its finding adverse to Laborde was *not* based on a judicial evaluation of the evidence; they ignored the statement that

> "This court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive [Laborde's] scholarly work appears to the court."

This omission creates an erroneous innuendo that the district court had made a judicial evaluation of the evidence.

(d) Despite the foregoing misstatements and material omissions, adverse to Laborde, in the Court of Appeals' opinions (Appendix A and B, *infra*) it is evident that the district court in *Laborde*, as the district court in *Jepsen*, erroneously placed on the woman faculty member a much greater burden, in her efforts to prove pretext, than that approved by the Supreme Court as applicable to Title VII cases. For the reasons set forth above the conflict between *Jepsen* and *Laborde* should be settled in favor of the holding in *Jepsen*.

3. The Conflict Between the Fifth Circuit Holding in *Jepsen v. Florida Board of Regents* (610 F.2d 1379, 1383 (Footnote 2) 1980) That It Is "Erroneous" for a Trial Court to Give "Deference" to a University's Stated Non-Discriminatory Reason for Its Action and the Holding by the Ninth Circuit, in the Case at Bench, That It Is Proper to Do So, Should Be Settled in Favor of the Fifth Circuit's Holding. If the Ninth Circuit's Holding Is Permitted to Stand, It Will Weaken Enforcement of Title VII by Making It More Difficult for a Plaintiff to Prove Pretext.

(a) *Jepsen* took the position that "deference" to the university's stated reason was contrary to the *McDonnell Douglas* standard for proving pretext. It stated

> "Prior to the *Sweeney* decision, some courts had expressed an attitude of "deference" to the decisions of universities in hiring and promotion matters, even in Title VII suits. . . ."

After reviewing authorities it concluded that "deference" was erroneous and that "the *McDonnell Douglas* standard is the appropriate standard to be used." (650 F.2d at p. 1383 footnote 2).

(b) The *Jepsen* position against deference is consistent with this Court's later decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In discussing the factors involved in proving "pretext" the court stated:

> ". . . . we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." (450 U.S. at p. 258).

If, however, the trial court gives "deference" to a university's proferred explanation, it *will be* particularly difficult to prove pretext. The concept of "deference" necessarily implies that the plaintiff prove pretext by more than a preponderance of the evidence. Such requirement will weaken enforcement of Title VII. It is contrary to *Jepsen*, *McDonnell Douglas* and *Burdine*.

(c) In the case at bench the district court, in concluding that Laborde had not proved "pretext" stated:

> ". . . the Court . . . . must give cautioned deference to the judgment of faculty members." (Conclusion of Law 6, C.R. 49).

(d) Although the Court of Appeals' Opinions do not specifically comment on the district court's action in granting "deference" to the University's decision, they upheld a judgment based on such deference.

If such improper action — deference — is allowed to continue it will seriously weaken enforcement of Title VII.

4. The Ninth Circuit's Decision, in the Case at Bench, Denied Laborde Access to the University's Records on Which Its Refusals to Promote Her to Full Professor Were Purportedly Based. Such Decision Conflicts With Decisions in the Fourth Circuit (*Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 Cert. Den. 434 U.S. 91 (1977) and the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-1385 (1980)) Which Upheld Such Right of Access. The Conflict Should Be Resolved in Favor of the Decisions of the Fourth and Fifth Circuits. The Ninth Circuit's Decision, by Denying a Title VII Plaintiff Access to Crucial Evidence, Weakens Enforcement of Title VII.

(a) *Jepsen* stated:

"In *Keyes v. Lenoir Rhyne College* . . . . The Court [of Appeals] stated that 'if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them to demonstrate that the explanation was pretextual'. . . . We find this reasoning to be persuasive where, as here, the University defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex.

The district court was correct, of course, in its desire to protect the confidentiality of these records. We *hold*, however, that the plaintiff should have been allowed to introduce these records into evidence. Any danger that the confidentiality of these records will be violated may be prevented by the entry of further protective orders. Reversed and remanded." (610 F.2d at pp. 1384-1385, emphasis ours).

(b) *Jepsen's* holding is consistent with the principles set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

(i) *Burdine*, in reliance on *McDonnell Douglas*, stated: "Third, should the defendant carry this burden [of articulating a legitimate non-discriminatory reason for its action] the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." (480 U.S. at p. 253).

(ii) *Burdine* further stated:

". . . . we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext." (480 U.S. at p. 258).

(c) Because (i) the employer need *merely articulate* a legitimate non-discriminatory reason for its action to rebut a *prima facie* case and (ii) the burden of proof is on the Title VII plaintiff to prove that the articulated reason is a pretext, common fairness and the transcendent legislative policy expressed by Title VII, *require* that the Title VII plaintiff be granted access to *all* the employer's records which are relevant to the reason which the employer articulated to rebut the *prima facie* case.

(d) The Court of Appeals, in the case at bench, erroneously upheld the district court's denial as "untimely" Laborde's motion to inspect the University's records.

The circumstances from which the "untimely" claim arose are as follows: Laborde's notice of motion for an order that she could inspect such records (C.R. 35) was filed 7 days after District Judge David W. Williams, who had been the presiding judge in the case at bench, transferred the case

to another judge. (C.R. 34). Laborde's motion recited that District Judge Williams was also the presiding judge in the case of *Therese Ballet Lynn v. The Regents of the University of California* [the case which later was reversed by the Court of Appeals, 656 F.2d 1337 (1981)]; that Lynn and Laborde had the same counsel; that Laborde's counsel, while acting for Lynn, had twice moved, in the *Lynn* case, for inspection of the University's records; that Judge Williams had twice denied inspection; that counsel regarded the factual and legal issues respecting inspection to be identical in both cases; they considered it to be a waste of judicial and legal time to make a similar inspection motion before Judge Williams on behalf of Laborde. (Laborde's inspection motion was filed 7 days after Judge Williams transferred Laborde's case to another judge.)

When the inspection motion was heard the University's counsel (i) did *not* claim that the delay in making the motion had prejudiced the University; (ii) stated that he had the requested records with him (R.T. 16) and proposed that the court review the records *in camera* to see if they show "discrimination" (R.T. 10); (iii) when Laborde's counsel objected to the court reviewing the records "without our being able to see it" the court immediately denied Laborde's motion as "untimely." (R.T. 16).

The Court of Appeals' final opinion (Appendix B, p. 14) gives an abbreviated description of the foregoing. Its statement that "Laborde . . . gave no reason for the delay" [in making the motion] is factually incorrect. The foregoing evidence shows the reason for the delay which was presented to the trial court.

The Court of Appeals' holding that it was not an abuse of discretion for the district judge to deny Laborde's motion as "untimely" (Appendix B, p. 14) is erroneous. The cause of the delay was reasonable. The University made no claim

it had been prejudiced by the delay. The records were in court. They could have been handed over immediately.

The tremendous importance of a Title VII plaintiff having access to the University's evaluations so that the objectives of Title VII may not be thwarted, confirm that the Court of Appeals erred in upholding the trial court's denial, as "untimely," Laborde's motion to inspect the University's records which *were in the courtroom when the motion was heard.*

Summary.

The Court of Appeals concedes that Laborde proved a *prima facie* case. (Appendix B, pp. 10-11). The 7 to 1 majority of the outside scholars which recommended that Laborde be promoted to full professor (pp. 3-4, *supra*) provides ample evidence that competent disinterested scholars considered her qualified for such promotion. The reasons why the Chancellor, the person who makes the final decision as to promotion, refused Laborde promotion every time since 1974 are not in evidence.

The foregoing demonstrates that Laborde overwhelmingly established that the University's failures to promote her to full professor, commencing in 1974, were due to sex discrimination.

This case, however, involves far more than Laborde's interests. The Court of Appeals' decision, if allowed to stand, can seriously weaken the enforcement of Title VII. It would be a precedent that (a) an employer *can* rebut a *prima facie* case without introducing evidence of the reasons for his actions; (b) proof by a preponderance of the evidence in *not* sufficient to enable a Title VII plaintiff to prove "pretext"; (c) it *is* proper for a district court to give "deference" to the employer's stated reason and (d) a district court *can* refuse to grant the Title VII plaintiff access to the

records on which the University claims it based its "non-discriminatory" reason.

It is of great public importance that the enforcement of Title VII *not* be weakened. For example, the members of the United States Commission on Civil Rights, in commenting, last month, on the Commission's study: "Unemployment and Underemployment Among Blacks, Hispanics and Women," which covered the years 1971 through 1980, concluded with the following, single recommendation, without dissent:

> ". . . . we must try to end discrimination directly by enforcing the law. The groups involved must not be shortchanged by finding their paths to employment opportunities blocked even when they have acquired education and skills."[5]

Because of the many petitions for certiorari which come before the Court, the undersigned respectfully suggest that this case may be suitable for a *per curiam* reversal citing *McDonnell Douglas*, *Burdine* and *Jepsen*, and the four questions presented herein.

Conclusion.

The petition should be granted with respect to the four questions presented.

Respectfully submitted,

JOHN G. SOBIESKI,

LADA S. MARX,

Counsel for Petitioner.

---

[5]United States Commission on Civil Rights: "Unemployment and Underemployment Among Blacks, Hispanics, and Women." Clearinghouse Publication No. 74. November 1982, p. 59.

APPENDIX A.

First Opinion of the Court of Appeals. (April 22, 1982).

ALICE MADELEINE LABORDE and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee. [No. 80-5718. Apr. 22, 1982].

FARRIS, C.J.: Alice Laborde started teaching at the University of California at Irvine in 1965 as an assistant professor. In 1970, she was awarded tenure as an associate professor in the French and Italian Department. Laborde was considered for promotion to full professor several times after the 1973-1974 academic year. Each time, the University decided against promotion.

Laborde brought an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, alleging that the University's decision not to promote her to full professor after 1975 was based on an unlawful discrimination against her sex.[1] The district court granted judgment for the University, finding that Laborde had established a case of prima facie discrimination, but that the University's decision not to promote her was based on her "inadequate" scholarship, and not her sex. This finding was not clearly erroneous. We affirm.

The Supreme Court recently restated the correct order and allocation of proof in Title VII discrimination cases:

---

[1]42 U.S.C. § 2000e-2(a)(1) states:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual wth respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

> In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (footnote omitted). *Accord, Lynn v. Regents of the University of California*, 656 F.2d 1337, 1341 (9th Cir. 1981).

Laborde had the initial burden of establishing a prima facie case of discrimination. We recently adapted the *McDonnell Douglas* elements of a prima facie case to a charge of sex discrimination in the academic context. *Lynn*, 656 F.2d at 1341. *See Smith v. University of North Carolina*, 632 F.2d 316, 340-41 (4th Cir. 1980). Laborde met this burden by showing that 1) she is a member of a class protected by Title VII, 2) she met the minimum qualifications to be considered for promotion to full professor, 3) she was denied promotion, and 4) men with similar qualifications have been promoted to full professor.

The prima facie case was established in part through the use of statistical evidence. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866-67

(9th Cir. 1982); *Lynn*, 656 F.2d at 1342-43 & n.3. The statistics raised an inference that the shortage of women at the University was the result of a general pattern of discrimination favoring men.[2] We emphasize, though, that statistical evidence of a sex-based disparity in hiring or promotion is a relevant, though not necessarily sufficient fact which may help establish a prima facie case of discrimination. The plaintiff also must prove that she was objectively qualified for the position or promotion. That Laborde was considered by the University for promotion is sufficient proof that she met the minimum objective qualifications, although statistical evidence might also have been used to help meet this requirement. *Id.*, at 1342.

After Laborde had established a prima facie case, the burden shifted to the University "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254. *See Lynn*, 656 F.2d at 1344.

The University met this burden by offering evidence that Laborde was repeatedly denied promotion to full professor

---

[2]The district court found:

> Certain testimony and documentary evidence supported plaintiff's contention that the University has underutilized women in the areas of numbers employed, rates of pay, ladder rank positions and promotions for tenure. The School of Humanities, of which plaintiff's Department is a part, underutilizes women in the ladder ranks—full, associate and assistant professors. The 1975-77 affirmative action status report stated the Humanities program had the second highest female ladder rank headcount disparity. The report further noted that 61% of the female faculty members were at a nontenured level as opposed to 27% of the male ladder rank faculty members. Further, the Dean of the School of Humanities testified that, while the availability of women in the Humanities program is approximately 30%, only about 12% of those women have tenure. Thus on a purely statistical basis in the years 1975-1977 women faculty members were treated differently at Irvine University than their male counterparts.

because she failed to meet the University's standards for scholarship and research.

The ultimate burden of persuasion then shifted back to Laborde to prove, by a preponderance of the evidence, that the University's articulated reason was "a pretext or discriminatory in its application." *McDonnell Douglas*, 411 U.S. at 807. *See Lynn*, 656 F.2d at 1345.

The district court found that Laborde had not sustained her burden of proving that the University's refusal to promote her was based on her sex and not on legitimate reasons. We review this finding under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *Pack v. Energy Research & Development Administration*, 566 F.2d 1111, 1113 (9th Cir. 1977). Read in its entirety, the record precludes a finding that the district court was clearly erroneous.

For the academic years prior to 1978-79, Laborde introduced scant evidence to support her allegation of discrimination. She was considered for promotion to full professor during the academic years 1973-74, 1975-76, 1976-77, 1977-78, and in 1979. Each time, the University decided against promotion, although as a result of these evaluations, she was given merit increases in 1973-74, 1975-76, and again in 1979, to her present rank of Associate Professor Step V. By 1979, she had published four books of scholarly criticism in the field of 18th Century French Literature, two books of poetry, and numerous articles and book reviews, and had read several papers at academic conventions.

The decision to promote a faculty member to full professor undergoes several stages of review.[3] At the first step in the review process, the candidate's department reviews the candidate and makes a recommendation for promotion. In 1976-77, 1977-78, and in 1979, Laborde's department made no recommendation for promotion. All of the outside scholars suggested by Laborde were contacted for the 1975-76 and 1976-77 reviews. In 1977-78, three of the four letters solicited and received were from scholars suggested by Laborde. One was from a women. Of the eight new scholars contacted in the fall of 1978, three were selected by Laborde, including two women. The district court found that

---

[3]In response to Laborde's charge of discrimination, the University introduced evidence that its review procedures were fair and would frustrate any attempt at discrimination. First, the candidate's department prepares a file on the candidate. It includes his or her scholarly writings and letters of recommendation solicited from outside scholars in the candidate's field, some of whom are suggested by the candidate. The department makes a recommendation, which it sends along with the file to the Dean of the candidate's school. The dean adds his or her recommendation to the file and forwards it to the academic personnel committee of the academic senate. This committee appoints an ad hoc committee to consider the promotion. When a woman is under consideration for promotion, at least one member of the committee is a woman. Next, the executive vice chancellor adds his or her recommendation and forwards the file to the chancellor, who makes the ultimate decision. If the chancellor's proposed decision is contrary to the recommendations in the file, those submitting recommendations are permitted to submit additional information.

The district court found many built in safeguards:

> While confidentiality of peer review records is the rule, there are internal safeguards to protect against abuse, including the number of reviewers involved in each academic determination, the independence of the various levels of review, [the use of] intra and extramural reviewers, the right of a candidate to request that particular reviewers be asked to submit evaluations, review by committee thereby eliminating any individualized arbitrary decisions, employment of an affirmative action officer at each campus to oversee academic review, the right of a candidate to obtain a written summary of confidential records, and finally, the right to complain before the Committee on Privilege and Tenure, a peer committee appointed by the Academic Senate of the faculty on the Irvine campus.

although a majority of these evaluations supported Laborde's promotion, they "provide[d] a mixed picture of plaintiff's scholarship." Somewhat less generously, the University characterized them as damnably faint in their praise. Accordingly, the collective academic judgment of the University was that Laborde did not meet the requisite standard of excellence in research and scholarship required for promotion to full professor. Instead, she was given a merit increase to Associate Professor Step V.

The district court found that Laborde had failed to prove by a preponderance of the evidence that she was denied promotion on the basis of her sex and not her deficient scholarship.[4] This finding was not clearly erroneous. We do not discredit Laborde's academic qualifications by adopting the University's description of her work as "inadequate" or "deficient." In reviewing her academic file, which contains many favorable comments, we recognize that her scholarship has already been considered worthy of several promotions to her present rank of Tenured Associate Professor Step V, which is just one step below full professor. We merely affirm the district court's finding that the University could reasonably have decided that, although good, her scholarship did not meet the University's high standards of academic excellence necessary for promotion to the highest faculty rank in the University.

Laborde argues that the district court erred by denying her request to inspect the University's peer review files as

---

[4]Laborde claims the court erred by giving "cautioned deference" to the University. The trial court acted consistently with other courts that have recognized that "caution against intervention in a university's affairs cannot be allowed to undercut the explicit legislative intent of Title VII." *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1383 (5th Cir. 1980). The court balanced these competing considerations by giving the University's subjective hiring decisions some deference, which was "cautioned" in light of Title VII's goal.

untimely. Laborde's motion was made shortly before trial, and months after discovery was to have been completed. The motion would never have been filed but for a last minute change of judges. The action had been pending before Judge Williams, who had denied access to the University's files in a substantially identical case in which Laborde's attorneys also represented the plaintiff. *See Lynn*. Because Laborde's attorneys saw no point in making the same motion before the same judge, they failed to make it. They filed the motion only after the case was transferred to Judge Hatfield. When the motion was heard at the time of trial, Laborde refused the court's offer of an *in camera* inspection and gave no explanation for the delay. Under these facts, it was not an abuse of discretion for the trial judge to have denied the motion as untimely.

AFFIRMED.

APPENDIX B.

Final Opinion of the Court of Appeals. (As Modified September 3, 1982).

ALICE MADELEINE LABORDE and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee. [No. 80-5718. Apr. 22, 1982 as Modified Sept. 3, 1982].

FARRIS, Circuit Judge:

Alice Laborde started teaching at the University of California at Irviine in 1965 as an assistant professor. In 1970, she was awarded tenure as an associate professor in the French and Italian Department. Laborde was considered for promotion to full professor several times after the 1973-1974 academic year. Each time, the University decided against promotion.

Laborde brought an action under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, *et seq.*, alleging that the University's decision not to promote her to full professor after 1975 was based on an unlawful discrimination against her sex.[1] She appeals the dismissal

---

[1] 42 U.S.C. § 2000e-2(a)(1) states:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

of her disparate treatment claim.[2] The district court granted judgment for the University, finding that Laborde had established a case of prima facie discrimination, but that the University's decision not to promote her was based on her "inadequate" scholarship, and not her sex. This finding was not clearly erroneous. We affirm.

The Supreme Court recently restated the correct order and allocation of proof in Title VII disparate treatment cases:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

---

[2]The district court stated that *Laborde* had shown statistically that the employment policies of the university may have unwittingly achieved an unlawful discriminatory result. The district court however did not discuss a disproportionate impact claim nor did the appellant pursue a disproportionate impact claim. She confined her argument to her disparate treatment claim. We confine our review to the issues raised on appeal. *See* Fed. R. App. Pro. 28(a)(2); *U.S. for Use and Benefit of Greenhalgh v. F.D. Rich Co., Inc.*, 520 F.2d 886, 890 n.4 (9th Cir. 1975); *Dower v. United Air Lines, Inc.*, 329 F.2d 684, 685 (9th Cir. 1964); *Peck v. Shell Oil Co.*, 142 F.2d 141, 143 (9th Cir. 1944). *See also United States v. White*, 454 F.2d 435, 439 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972); *Kletschka v. Driver*, 411 F.2d 436, 446-47 (2d Cir. 1969).

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (footnote omitted). *Accord, Lynn v. Regents of the University of California*, 656 F.2d 1337, 1341 (9th Cir. 1981).

Laborde had the initial burden of establishing a prima facie case of discrimination. We recently adapted the *McDonnell Douglas* elements of a prima facie case to a charge of sex discrimination in the academic context. *Lynn*, 656 F.2d at 1341. *See Smith v. University of North Carolina*, 632 F.2d 316, 340-41 (4th Cir. 1980). Laborde met this burden by showing that 1) she is a member of a class protected by Title VII, 2) she met the minimum qualifications to be considered for promotion to full professor, 3) she was denied promotion, and 4) men with similar qualifications have been promoted to full professor.

A prima facie case was established in part through the use of statistical evidence.[3] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866-67 (9th Cir. 1982); *Lynn*, 656 F.2d at 1342-43 & n.3. The statistics raised an inference that the shortage of women at the University was the result of a general pattern of dis-

---

[3]Although the district court appeared to assume that statistical evidence alone can establish a prima facie case, we do not reach the question. Laborde independently satisfied many of the prima facie requirements stated in *Lynn*.

crimination favoring men.[4] Statistical evidence of a sex-based disparity in hiring or promotion is a relevant, though not necessarily sufficient fact in establishing a prima facie case of disparate treatment.[5] The plaintiff also must prove that she was objectively qualified for the position or promotion. That Laborde was considered by the University for promotion is sufficient proof that she met the minimum objective qualifications, although statistical evidence might also have been used to help meet this requirement. *Id.*, at 1342.

---

[4]The district court found:

> Certain testimony and documentary evidence supported plaintiff's contention that the University has underutilized women in the areas of numbers employed, rates of pay, ladder rank positions and promotions for tenure. The School of Humanities, of which plaintiff's Department is a part, underutilizes women in the ladder ranks—full, associate and assistant professors. The 1975-77 affirmative action status report stated the Humanities program had the second highest female ladder rank headcount disparity. The report further noted that 61% of the female faculty members were at a nontenured level as opposed to 27% of the male ladder rank faculty members. Further, the Dean of the School of Humanities testified that, while the availability of women in the Humanities program is approximately 30%, only about 12% of those women have tenure. Thus on a purely statistical basis in the years 1975-1977 women faculty members were treated differently at Irving University than their male counterparts.

495 F. Supp. at 1071.

[5]This court recently reviewed the proper role statistical data should play in disparate treatment cases. In *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1342-43 (9th Cir. 1981), we stated:

> The Supreme Court has stated that general statistical data is helpful in individual employment discrimination cases. It is particularly helpful in the academic context, where the tenure decision is highly subjective. It is relevant despite the fact that the data may not be directly probative of any of the four specific elements [required for a prima facie case]. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is "more likely than not" that a University's decision to deny tenure was based on sex, "a discriminatory criterion illegal under the Act."

After Laborde had established a prima facie case, the burden of production shifted to the University "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254. *See Lynn*, 656 F.2d at 1344.

The University met this burden by offering evidence that Laborde was repeatedly denied promotion to full professor because she failed to meet the University's standards for scholarship and research.

The burden then shifted back to Laborde to prove, by a preponderance of the evidence, that the University's articulated reason was a "pretext or discriminatory in its application." *McDonnell Douglas*, 411 U.S. at 807. *See Lynn*, 656 F.2d at 1345.

The district court found that Laborde had not sustained her burden of proving that the University's refusal to promote her was based on her sex and not on legitimate reasons. We review this finding under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *Pack v. Energy Research & Development Administration*, 566 F.2d 1111, 1113 (9th Cir. 1977). Read in its entirety, the record precludes a finding that the district court was clearly erroneous.

For the academic years prior to 1978-79, Laborde introduced scant evidence to support her allegation of discrimination. She was considered for promotion to full professor during the academic years 1973-74, 1975-76, 1976-77, 1977-78, and in 1979. Each time, the University decided against promotion, although as a result of these evaluations, she was given merit increases in 1973-74, 1975-76, and again in 1979, to her present rank of Associate Professor Step V. By 1979, she had published four books of scholarly criticism in the field of 18th Century French Literature, two

books of poetry, and numerous articles and book reviews, and had read several papers at academic conventions.

The decision to promote a faculty member to full professor undergoes several stages of review.[6] At the first step in the review process, the candidate's department reviews the candidate and makes a recommendation for promotion. In 1976-77, 1977-78, and the 1979, Laborde's department made no recommendation for promotion. All of the outside scholars suggested by Laborde were contacted for the 1975-76 and 1976-77 reviews. In 1977-78, three of the four letters solicited and received were from scholars suggested by Laborde. One was from a woman. Of the eight new scholars contacted in the fall of 1978, three were selected by Laborde, including two women. The district court found that although a majority of these evaluations supported Laborde's promotion, they "provide[d] a mixed picture of plaintiff's scholarship." Somewhat less generously, the University characterized them as damnably faint in their praise. Accordingly, the collective academic judgment of the University was that Laborde did not meet the requisite standard of excellence in research and scholarship required for promotion to full professor. Instead, she was given a merit increase to Associate Professor Step V.

---

[6]First, the candidate's department prepares a file on the candidate. It includes his or her scholarly writings and letters of recommendation solicited from outside scholars in the candidate's field, some of whom are suggested by the candidate. The department makes a recommendation, which it sends along with the file to the Dean of the candidate's school. The dean adds his or her recommendation to the file and forwards it to the academic personnel committee of the academic senate. This committee appoints an ad hoc committee to consider the promotion. When a woman is under consideration for promotion, at least one member of the committee is a woman. Next, the executive vice chancellor adds his or her recommendation and forwards the file to the chancellor, who makes the ultimate decision. If the chancellor's proposed decision is contrary to the recommendations in the file, those submitting recommendations are permitted to submit additional information.

The district court found that Laborde had failed to prove by a preponderance of the evidence that she was denied promotion on the basis of her sex and not her deficient scholarship. This finding was not clearly erroneous. We do not discredit Laborde's academic qualifications by adopting the University's description of her work as "inadequate" or "deficient." In reviewing her academic file, which contains many favorable comments, we recognize that her scholarship has already been considered worthy of several promotions to her present rank of Tenured Associate Professor Step V, which is just one step below full professor. The district court found that the University reasonably decided that, although good, her scholarship did not meet the University's high standards of academic excellence necessary for promotion to the highest faculty rank in the University. This finding was not clearly erroneous.

Laborde argued that the district court erred by denying her request to inspect the University's peer review files as untimely. Laborde's motion was made shortly before trial, and months after discovery was to have been completed. The motion would never have been filed but for a last minute change of judges. The action had been pending before Judge Williams who had denied access to the University's files in a substantially identical case in which Laborde's attorneys also represented the plaintiff. *See Lynn*. Because Laborde's attorneys saw no point in making the same motion before the same judge, they failed to make it. They filed the motion only after the case was transferred to Judge Hatfield. When the motion was heard at the time of trial, Laborde refused the court's offer of an *in camera* inspection and gave no explanation for the delay. Under these facts, it was not an abuse of discretion for the trial judge to have denied the motion as untimely.

AFFIRMED.

APPENDIX C.

Order Denying Laborde's Petition for Rehearing as to First Opinion (September 7, 1982) With Dissenting Opinion (September 7, 1982).

Clerk, U. S. Court of Appeals for the Ninth Circuit.

ALICE MADELEINE LABORDE, and all others similarly situated, Plaintiffs-Appellants, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee. [No. 80-5718, Filed Sept. 7, 1982].

Before: CHOY, KENNEDY, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. A modified opinion has been filed.

The full court has been advised of the suggestion for rehearing en banc, and a judge in active service requested that a vote be taken. Fed. R. App. 35(b). Upon the vote of the judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Laborde v. Regents of the University of California — No. 80-5718.

FERGUSON, Circuit Judge, dissenting from an en banc vote.

This dissenting statement is filed by reason of the failure of the court to consider this case en banc.

The panel opinion presents the strongest case possible that Alice Laborde is the victim of invidious sex discrimination.

The opinion states in clear language that men with qualifications similar to hers have been promoted to full professor positions.

Yet the opinion concludes that she is not entitled to promotion because she failed to meet the University's standards for scholarship and research.

The logical conclusion of that analysis is that men who do not meet the standards of scholarship and research will be promoted, but women will not unless they meet the standards. Title VII prohibits that type of discrimination.

Filed: September 7, 1982.

APPENDIX D.

Order Construing Laborde's September 17, 1982 Petition for Rehearing as to the Second Opinion as a Motion to Reconsider and Denying Such Motion. (October 18, 1982).

Clerk, U. S. Court of Appeals for the Ninth Circuit.

ALICE MADELEINE LABORDE, and all others similarly situated, Plaintiffs-Appellants, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee. [No. 80-5718, D.C. No. CV 78-1662-DWW, Filed Oct. 18, 1982].

Before: CHOY, KENNEDY, and FARRIS, Circuit Judges.

Appellant's petition for rehearing and suggestion for rehearing en banc is construed as a motion to reconsider this court's order of September 7, 1982 denying appellant's previously filed petition for rehearing and suggestion for rehearing en banc. So construed, the motion for reconsideration is denied. The mandate in this case shall issue forthwith.

APPENDIX E.

District Court's Findings of Fact and Conclusions of Law. (May 19, 1980).

Clerk, U. S. District Court, Central District of California.

ALICE MADELEINE LABORDE, and all other persons similarly situated, Plaintiffs, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant. [No. CV 78-1662 DWW (Hatfield) Filed May 19, 1980].

Plaintiff Alice Laborde, tenured Associate Professor in the French and Italian Department of the Irvine campus of the University of California, seeks redress for an alleged violation of her rights as protected under the Civil Rights Act of 1964, Title VII. Her claim was spurred, in essence, by the University's refusal to promote plaintiff to the rank of full professor beginning in 1975. Plaintiff alleges defendant's failure to promote her was based on reasons of sex and national origin.

At the conclusion of this non-jury case, the Court requested that the parties simultaneously submit post-trial briefs addressing, in part, a Rule 41(b) motion for dismissal and a motion to strike certain documentary evidence. Prior to setting forth the findings the Court hereby rules on the above motions.

The motion for dismissal under Rule 41(b), F.R.Civ.P., made after presentation of plaintiff's evidence is hereby denied upon the grounds and for the reasons that the Court cannot find that the facts and law as presented by plaintiff clearly show the plaintiff has no right to relief.

Further, the motion to strike from evidence Exhibits 12, 49-51, 55-62, 64, 66 and 73 is hereby GRANTED. The Court has garnered from plaintiff's post-trial pleadings that she only opposes striking exhibits 55-62 since she has failed

to discuss the remaining exhibits. Exhibits 55-62 relate to publication of plaintiff's book by the University of California Press. The Court finds that they are not relevant to the claim for relief and they are accordingly stricken.

With the foregoing rulings made, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

Plaintiff is a naturalized citizen, born in Algeria and of French national origin. She was employed by defendants as an Assistant Professor Step I from July 1965 through June 30, 1967; as an Assistant Professor Step II in 1967; as an Assistant Professor Step III in 1968; and as an Assistant Professor Step IV in 1969. Plaintiff received tenure as an Associate Professor Step I in 1970. She was promoted to Associate Professor Step II in 1972; Associate Professor Step III in 1974; Associate Professor Step IV in 1976; and Associate Professor Step V on July 1, 1979.

II.

Defendants, The Regents of the University of California (hereafter "University"), is a corporation duly organized and existing under and by virtue of Article IX, section 9 of the California Constitution. It is authorized and empowered by that section of the California Constitution to administer a public trust known as the University of California, of which the University of California, Irvine is one campus.

III.

Plaintiff's action is based upon the Civil Rights Act of 1964, Title VII, as amended 42 U.S.C. §§2000e, *et seq.* Plaintiff claims that defendants unlawfully discriminated against her on the basis of sex and French national origin.

Plaintiff seeks redress in the form of a promotion to Full Professor as of the 1975-76 academic year, back pay, broad remedial injunctive relief and attorney's fees.

IV.

Defendants maintain a procedure of confidential peer review for promotion within certain academic ranks including that occupied by the plaintiff, the rank of Associate Professor, the second highest tenured position within the University. The procedure is set forth in writing in detail and provides for multiple levels of review including review by the department of which the candidate is a member, review by intra and extramural scholars, review by the Dean of the particular school, review by an Ad Hoc Review Committee, review by the Committee on Academic Personnel; and finally, review and decision by the Chancellor of the campus.[1] The system of review is confidential for it is believed that such confidentiality assures candid and objective evaluations from which the most equitable determinations for promotion can be made. While confidentiality of peer review records is the rule, there are internal safeguards to protect against abuse, including the number of reviewers involved in each academic determination, the independence of the various levels of review, intra and extramural reviewers, the right of a candidate to request that particular reviewers be asked to submit evaluations, review by committee thereby eliminating any individualized arbitrary decisions, employment of an affirmative action officer at each campus to oversee academic review, the right of a candidate to obtain a written summary of confidential records, and finally, the right to complain before the Committee on Privilege and Tenure,

---

[1]See Appendix 1 for a flow chart of the process of academic personnel review.

a peer committee appointed by the Academic Senate of the faculty on the Irvine campus.

V.

During the 1973-74 academic year, plaintiff was reviewed for an accelerated promotion from Associate Professor Step II to full professor. Plaintiff's department supported the promotion after a book which plaintiff had written was accepted for publication. However, plaintiff did not receive her promotion to full professorship; rather, she received a merit increase to Associate Professor Step III. Plaintiff is not seeking relief based upon denial of promotion in the 1973-74 academic year.

VI.

In the 1975-76 academic year, plaintiff was again reviewed for promotion. The review was in accordance with Academic Personnel Rules of the University. All of the extramural evaluators suggested by the plaintiff were contacted. Each of these evaluators was sent a full and complete biography of the plaintiff. The plaintiff reviewed the nonconfidential materials in her file. Although plaintiff complained that she was not given the reassons why she was not promoted, Dean William Lillyman testified that he explained to plaintiff the reasons promotion was denied. The reasons mostly pertained to plaintiff's scholarship. As a result of the 1975-76 review for promotion, plaintiff was given a merit increase to Associate Professor Step IV.

VII.

In the 1976-77 academic year, the plaintiff requested review for promotion from Associate Professor Step IV to full professor. There was no new scholarly material in plaintiff's file and thus the same outside scholars were used as had been used during the 1975-76 review. Since there was

no new scholarly material, and after having supported plaintiff twice and having been turned down twice, the recommendation of her French and Italian Department was that no action be taken. Plaintiff was again denied a full professorship for the 1976-77 academic year.

VIII.

Plaintiff requested review for promotion again in the 1977-78 year. Four extramural letters were solicited and received. Three of these were from scholars suggested by the plaintiff. One of the scholars was a woman. A February 1977 letter written by the Department Chairman stated "The Department does not wish to support a recommendation for promotion to Full Professor at this time." Therefore, there was a "no action" recommendation by the Department. Plaintiff was provided a summary of material in accordance with Academic Personnel Manual Rule 195, which had gone into effect September 15, 1977. This Rule changed the process of academic review so as to provide a candidate under review for promotion with a disaggregated summary of the substance of confidential material in the file, including the recommendation of the Department. Although the candidate may request a complete summary, a departmental summary is provided automatically under the Rule. Plaintiff responded to the departmental summary and the response was made an official part of her review file. By fall, 1978, a new manuscript had been prepared by plaintiff and since no definitive decision had been made, eight new scholars were selected for review. Three of these people were suggested by the plaintiff and two were women. The Department decision was a split vote for promotion, but there was agreement that plaintiff should receive a merit increase to Associate Professor Step V which was given effective July 1, 1979.

IX.

The summaries of the eight extramural scholars contacted in the fall of 1978 provide a mixed picture of plaintiff's scholarship. There was evidence that some of the scholarly works of Professor Laborde were marked by weaknesses of organization, obscure analysis and failure to accomplish the stated purpose of the article. However, the majority of the outside evaluations supported Professor Laborde's promotion to the rank of full professor.

X.

While two of the requirements for promotion to full professorship were met by Professor Laborde — University service and teaching ability — it was the collective academic judgment of the University that plaintiff lacked the third requirement for promotion — excellence in research and scholarship. I cannot say that the University's determination that Professor Laborde's scholarship as inadequate was unreasonable.[2] This Court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive her scholarly work appears to the Court. The crucial inquiry for the Court is and has been whether the decision not to promote the plaintiff was made without the influence of sex or national origin discrimination. I am unable to find any evidence that plaintiff's gender or national origin in-

---

[2]Plaintiff argues that she was wrongfully denied admission of certain confidential academic peer review records maintained by the University. These evaluation records, plaintiff asserts, would attest to plaintiff's scholarly qualifications for a 1979 promotion to full professor. One week before trial of this case and months after discovery was to be completed (February 1, 1979) under the local rules, plaintiff moved for discovery of her academic peer review file. The motion was heard at the time of trial. The Court unsuccessfully requested an explanation for the delay in seeking these files. Thereafter the Court offered plaintiff an in-camera inspection, but the plaintiff refused, seeking instead absolute examination of the files. The motion was then denied on the basis of untimeliness.

fluenced the decision not to promote plaintiff to the rank of full professor.

XI.

Plaintiff contends that she has had scholastic attainments equal to or better than her male counterparts holding the position of full professor in the Department of Humanities.

It appears that from the number of plaintiff's books and other publications that her output is greater than her fellow male professors. The irrefutable fact remains, however, that promotion within the halls of academia is not based on the quantity of scholarly works produced, but rather upon the quality of those works. The Court finds the weight of the evidence is that plaintiff's scholarship was inadequate, and although there was evidence to the contrary, I cannot say that the Department, the various committees and those bodies or individuals who reviewed the decision making process were unreasonable in reaching the conclusion that plaintiff should not be promoted. Excellence in scholarship is a significant and rational criterion in connection with the decision to promote. Obviously an instructor may have outstanding teaching skills while lacking proficiency in scholarship. The University persuasively demonstrated that the failure to grant plaintiff her promotion was based on professional reasons unconnected with plaintiff's sex or national origin.

XII.

Certain testimony and documentary evidence supported plaintiff's contention that the University has underutilized women in the areas of numbers employed, rates of pay, ladder rank positions and promotions for tenure. The School of Humanities, of which plaintiff's Department is a part, underutilizes women in the ladder ranks — full, associate and assistant professors. The 1975-77 affirmative action status report stated the Humanities program had the second

highest female ladder rank headcount disparity. The report further noted that 61% of the female faculty members were at a nontenured level as opposed to 27% of the male ladder rank faculty members. Further, the Dean of the School of Humanities testified that, while the availability of women in the Humanities program is approximately 30%, only about 12% of those women have tenure. Thus on a purely statistical basis in the years 1975-1977 women faculty members were treated differently at Irvine University than their male counterparts.

XIII.

Plaintiff complained of disparate treatment by having to teach Monday, Wednesday and Friday classes, and that such classes generally were grammar and composition courses. Since her research required her to travel to out-of-town libraries, Tuesday and Thursday classes were preferable to plaintiff. Course assignments are made by the Chairman of the Department. Upon hearing of plaintiff's scheduling complaints in 1976, the Chairman of the Department made a change in plaintiff's teaching schedule. Plaintiff further testified that she volunteered to teach at anytime and that she was a good teacher of language and grammar courses. Further, there was testimony that native speakers bring a cultural richness and fluency to language and grammar courses; the practice of assigning native speakers to teach such courses occurs at other institutions of higher education. There is nothing discriminatory with this employment practice, under the facts proven.

XIV.

Plaintiff alleges that she has been unlawfully discriminated against because she has never been offered the chairmanship of her Department while all other tenured male faculty members in the Department have, at various times,

held that post. Further, plaintiff complains that she was not made Chairman of the Department nor paid as a Chairman during the years 1965-68 when, according to plaintiff, she performed all the duties of the post. Between 1965-68, Seymour Menton was the Chairman of the Department of Foreign Languages; at that time, there was simply a division of French and Italian. Thus, there was no Chairman since there was no Department of French and Italian. Since the establishment of the Department of French and Italian, it is clear that plaintiff did not have the support of other members of the Department regarding her appointment as Department Chairman.

XV.

Plaintiff was Chief Academic Advisor in the years 1973-75; she believes that she should have held the title of Dean. However, plaintiff testified that she did not seek a different title while Chief Academic Advisor, nor did she seek greater pay. The person who succeeded to the work of Chief Academic Advisor was in fact an Associate Dean prior to assuming those functions and already had other responsibilities beyond those of a Chief Academic Advisor.

XVI.

There was no evidence of any retaliation against plaintiff for support she may have given Therese Lynn, another faculty member, for promotion to tenure.[3]

---

[3]Not only does the Court make this finding, but also the Court assumes that since there was no reference whatsoever to the retaliation allegation in the post trial memoranda submitted by plaintiff's counsel, that plaintiff has abandoned this allegation as a ground for relief. Furthermore, it is apparent plaintiff has abandoned other claims of discrimination which appear either in the complaint or were litigated at trial since they too are not addressed in the plaintiff's post trial proposed findings of fact and conclusions of law.

XVII.

Although the plaintiff complains of improper solicitation of scholarly opinions from men, the testimony indicates quite clearly that a number of women were selected to review plaintiff's scholarship. It was the testimony of Vice Chancellor James L. McGaugh that women are appointed to Ad Hoc Review committees when a woman is under review for promotion.

XVIII.

Plaintiff claims that another member of the Department of French and Italian, who was a member of the editorial board of the University of California Press, influenced the Press' decision to deny publication of plaintiff's book. The documentation and testimony clearly showed that the member of the editorial board disqualified himself from review of the manuscript, participation in discussions and selection of extramural readers. Further, witnesses testified that there was no stigma attached to a denial of publication of a manuscript by the University of California Press.

XIX.

Although plaintiff claims disparate treatment in being an Associate Professor Steps IV and V, there was testimony that there are also many men on the campus who have been Associate Professor Step IV longer than the normal period of service for review for promotion from Associate Professor to full professor. Further, there have been men reviewed for full professor from Associate Professor Step IV who have been denied promotion but received a merit increase to Associate Professor Step V.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000e-5(f)(3). Title VII became applicable to defendant on March 24, 1972.

2. Plaintiff filed charges with the EEOC on March 2, 1977. Plaintiff's claim for failure to be promoted in the 1973-74 academic year and failure to have the title of Associate Dean with commensurate pay as Chief Academic Advisor during the years 1973 and 1974 are barred under the 1964 Civil Rights Act inasmuch as plaintiff did not timely file a charge under this Act within 300 days after these allegedly unlawful employment practices occurred. 42 U.S.C. §2000e-5(e). Further, plaintiff's claim with respect to failure to be recognized as Department Chairman during the years 1965-68 occurred at a time before Title VII was applicable to defendant.

3. Plaintiff has complied with the procedural requirements of 42 U.S.C. §2000e-5(f) with regard to her claim of failure to be promoted to Full Professor during the 1975-76 academic year and thereafter.

4. The essence of plaintiff's claim is that the failure to promote plaintiff to the rank of Full Professor beginning with the academic year 1975-76 and years thereafter amounted to a violation of Title VII. 42 U.S.C. §2000e-2(a)(1) states:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

5. To prevail in her action plaintiff must show that she is qualified for the position she seeks and that regardless of her qualifications she was rejected on the basis of her sex or national origin. The U. S. Supreme Court has recently restated the burden of proof applicable in sex discrimination

cases. Although vacating the First Circuit Court of Appeals' holding in *Board of Trustees of Keene State College v. Sweeney*, 569 F.2d 169 (1st Cir. 1978), the Court nonetheless approved the following standard set forth in *Sweeney*:

> . . . a plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, non-discriminatory reason accounted for its actions. If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretex for discrimination. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination.

Sweeney, supra, at 177; *See, Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 25 at 27, and n.1 p. 25 (1975) (per curiam).

6. It is well settled that statistics may be used to establish a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977); *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1361 (D.Pa. 1977); *U.S. v. Ironworkers Local 86*, 443 F.2d 551 (9th Cir. 1971).

The statistical evidence presented here establishes a prima facie case. The evidence established a shortage of women with respect to numbers on the faculty, academic rank, promotion to tenure, and salaries. Although plaintiff was unable to show open discrimination, in light of these statistics it would appear the employment policies followed by the University may unwittingly achieve an unlawful discriminatory result: *See, Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

When plaintiff established a prima facie case of discrimination, the defendant had the duty to 'articulate' legitimate nondiscriminatory reasons for its failure to promote plaintiff to the rank of Full Professor. Defendant met that burden. There was substantial evidence that Professor Laborde's scholarship was not of the quality expected of a Full Professor at Irvine University. The individuals comprising the committees for rank promotion were in the most advantageous position to assess plaintiff's scholarly qualifications. While the Court is not unmindful of its responsibility to provide a forum for litigation of discrimination complaints, it nevertheless must give cautioned deference to the judgments of faculty members. Cussler v. University of Maryland, 430 F.Supp. 602, 605-606 (D.Md. 1977).

The decision not to promote the plaintiff was made according to the procedures outlined in the University handbook. Plaintiff was given every consideration at each stage of decision-making and review.

7. Plaintiff contends that the presumptively valid reasons for non-promotion were a mere pretext for discrimination. The Court concludes, however, that the University's refusal to promote Professor Laborde to Full Professor was based on legitimate reasons and not because of her sex or national origin. Plaintiff has failed to convince the Court by a preponderance of the evidence that she was a victim of illegal discrimination. Plaintiff simply failed to prove she was qualified for promotion.

Since plaintiff failed in her proof to establish a violation of Title VII, plaintiff's claim for relief on all counts must be dismissed. The Clerk is directed to enter an order dis-

missing the complaint. Defendants may recover their costs from plaintiff.

DATED this 16 day of May, 1980.

/s/ PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

1.,

UNIVERSITY OF CALIFORNIA
PROCESS OF ACADEMIC PERSONNEL REVIEW

INCORPORATING RECOMMENDATIONS OF SPECIAL COMMITTEE ON PERSONNEL RECORDS

(APPLIES TO APPOINTMENTS AND PROMOTIONS TO TENURE AND TO APPRAISALS OF ASSISTANT PROFESSORS FOR RETENTION. CHART DOES NOT REFLECT CERTAIN VARIATIONS OF ADMINISTRATIVE STRUCTURE AMONG THE CAMPUSES.)

Underlined portions of text denote safeguards for candidate.

1. Personnel file. Information on candidate including confidential letters from extramural sources (nominated in part by candidate), evaluating:
   (i) teaching;
   (ii) research and creative work;
   (iii) professional activity;
   (iv) University and public service.

   The four areas reviewed for appointment, appraisal, and promotion, is collected by chairperson of department.

2. Chairperson prepares review file for department's consideration, informs and counsels candidate about review process and gives candidate opportunity to add information to file.

3. Department reviews case and makes recommendation for transmittal by chairperson to Deans and further authorities.

4. Chairperson prepares letter to Dean and indicates department's recommendation, reports vote and prepares independent appraisal; forwards with review file.

   Chairperson informs candidate of the scope of departmental decision in the four areas, and of the vote. Candidate may submit response to departmental actions if in writing, response becomes part of file.

5. Dean receives review file and chairperson's letter; makes recommendation to Chancellor.

6. Chancellor's Office sends complete file to standing Budget (Personnel) Committee. On that Committee's nomination, Chancellor appoints confidential ad hoc committee which reviews file and reports to Chancellor.

7. Chancellor's Office forwards ad hoc committee report to Budget Committee, which makes its recommendation to Chancellor on the basis of the full file, including ad hoc cttee. report.

8. Chancellor receives:
   (i) departmental recommendation and chairperson's confidential letter;
   (ii) Dean's recommendation;
   (iii) ad hoc committee recommendation;
   (iv) Budget Committee recommendation;

   and makes decision, subject to Regental review in certain cases.

9. On request of candidate, Chancellor prepares summary of appraisal reports together with reasons for decision.

   Before a final decision is made to terminate or not to reappoint, Chancellor informs, with reasons, Dean and departmental chairperson, who inform candidate. Candidate and chairperson may respond in writing and include additional documentation.

10. Candidate may appeal to Senate Standing Privilege and Tenure Committee on grounds of procedural error or use of improper criteria.

11. Privilege and Tenure Committee investigates and may hold hearings, if appropriate. Committee has access to all pertinent material in file. Makes recommendation to Chancellor, with copy to candidate.

12. Chancellor reviews and acts on recommendation of Privilege and Tenure Committee. Candidate is informed of decision.

Recommendation Phase — Review Phase — Decision Phase — Appeal Phase

APPENDIX F.

Judgment of the District Court. (May 22, 1980).

Clerk U. S. District Court, Central District of California.

ALICE MADELEINE LABORDE, and all other persons similarly situated, Plaintiffs, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant. [No. CV 78-1662 DWW (Hatfield) Filed May 19, 1980].

This action regularly came on for trial on Tuesday, January 22, 1980, Lada S. Marx and John G. Sobieski appearing for plaintiff Alice M. Laborde, and John F. Lundberg and Christine Helwick appearing for defendants, the Regents of the University of California. Evidence, both oral and documentary has been presented, the cause has been argued and submitted for decision and the Court has caused to be made and filed herein its Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED, for the reasons stated in the Court's findings of fact and conclusions of law this day filed, that defendants have judgment, plaintiff's complaint be dismissed, and that defendants recover from plaintiff their costs of suit herein.

Dated this 16 day of May, 1980.

/s/ PAUL S. HATFIELD
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-950

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALICE MADELEINE LABORDE,
Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD L. REIDHAAR
COUNSEL OF RECORD
JOHN F. LUNDBERG
CHRISTINE HELWICK
MELVIN W. BEAL
590 University Hall
2200 University Avenue
Berkeley, California 94720
Telephone: (415) 642-2822
Counsel for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Reasons Why Writ Should Be Denied	1
1. The First Question Presented by Petitioner Fails to Apply Well Settled Standards As to the Defendant's Burden in Rebutting a Prima Facie Case in a Title VII Action	1
2. Petitioner's Second Question Misstates the Burden the Trial Court and Ninth Circuit Applied to Petitioner's Proof of Pretext	3
3. The Third Question Concerning Judicial "Deference" to the University's Stated Nondiscriminatory Reason For Its Action Is Settled Contrary to Petitioner	7
4. The Trial Court's Refusal to Provide Laborde Access to Confidential Academic Personnel Records Was Not An Abuse of Discretion Under the Facts Stated in Petition	9
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

Page

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 2

Croley v. Matson Navigation Co., 434 F.2d 73 (5th Cir. 1970) 9

Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974) 8

Jepsen v. Florida Board of Regents, 610 F.2d 1379 (5th Cir. 1980) 3, 7, 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4

Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978), cert. denied, 439 U.S. 984 (1978) 8, 9

Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 177 (1st Cir. 1978) 5

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 2, 4, 9

No. 82-950

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALICE MADELEINE LABORDE,
Petitioner,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Regents of the University of California (hereafter "University"), respectfully requests denial of the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 686 F.2d 715-719.

REASONS WHY WRIT SHOULD BE DENIED

1. The First Question Presented by Petitioner Fails to Apply Well Settled Standards As to the Defendant's Burden in Rebutting a Prima Facie Case in a Title VII Action

Petitioner Laborde argues that the Court of Appeals is in error when it holds that the University has rebutted Laborde's prima facie case. In support of this, Laborde

claims that there is no evidence in the record that the Chancellor's decision denying Laborde's promotion to full professor was based on legitimate, nondiscriminatory reasons.

The defendant's burden in rebutting an employee's prima facie case alleging job discrimination under Title VII of the Civil Rights Act of 1964 is clearly stated in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-256 (1981):

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *The defendant need not persuade the court that it was actually motivated by the proffered reasons.* See Sweeney, supra, at 25, 58 L.Ed.2d 216, 99 S.Ct. 295. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S. at 254, emphasis ours.)

And, quoting *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978),

> "'the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons."'" (450 U.S. at 256.)
>
> "We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." (450 U.S. at 257.)

Contrary to Laborde's assertion, evidence was presented supporting the reason for nonpromotion. At trial the legitimate, nondiscriminatory reason for the failure to promote Professor Laborde was asserted by the University: that at the outcome of the University's multilevel review process, including a variety of internal safeguards, a decision was made by the Chancellor that she lacked the excellence in research and scholarship required for promotion to the rank of full professor. Furthermore, the summaries of evaluations by peers who reviewed Professor Laborde's scholarship were placed into evidence by her. The summaries reflected the consideration which formed the basis for the ultimate decision not to promote. Thus, the trier of fact had before it the lawful reason for the action from which the court could rationally conclude that the employment decision had not been motivated by discriminatory animus, but also summaries of the underlying peer evaluations of petitioner's scholarship.

The University met its burden in rebutting Laborde's prima facie case. The court below properly so held.

2. Petitioner's Second Question Misstates the Burden the Trial Court and Ninth Circuit Applied to Petitioner's Proof of Pretext

In the statement of the second question, Laborde asserts a conflict between a Fifth Circuit decision (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980)) holding that a Title VII plaintiff can prove "pretext" by a preponderance of the evidence and the Ninth Circuit's holding as to plaintiff's burden in the instant case. Laborde claims that the decision of the Ninth Circuit requires that

a Title VII plaintiff must prove that an employer-stated reason for an action is "unreasonable." Laborde's claim is without merit.

This Court has settled the question of the burden of proof a Title VII plaintiff must carry in proving pretext in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253:

> "[S]hould the defendant carry this burden [articulating lawful reasons for the action], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

The Court of Appeals properly applied this standard. Laborde's support for the idea that the Court of Appeals applied a standard of "unreasonableness" is Finding of Fact X. There the trial court stated that it could not say that the determination of the adequacy of Professor Laborde's scholarship was "unreasonable." Laborde attempts to infer an incorrect application of the burden of proof from the mere use of the word "unreasonable."

A reading of the whole of Finding X indicates that the use of the word "unreasonable" imposed no greater burden of proof on Laborde:

> "While two of the requirements for promotion to full professorship were met by Professor Laborde—University service and teaching ability—it was the collective academic judgment of the University that plaintiff lacked the third requirement for promotion—excellence in research and scholarship. I cannot say that the University's determination that Professor Laborde's scholarship as inadequate was unreasonable.

> [Footnote omitted.] This Court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive her scholarly work appears to the Court. *The crucial inquiry for the Court is and has been whether the decision not to promote the plaintiff was made without the influence of sex or national origin discrimination. I am unable to find any evidence that plaintiff's gender or national origin influenced the decision not to promote plaintiff to the rank of full professor.*" (Emphasis ours.)

The court, in Finding X, correctly states what the judicial inquiry ought to be and carefully separates that inquiry from judgments of academic quality. Laborde has blurred the inquiry as to academic quality and the inquiry as to whether the decision not to promote was discriminatory. Nowhere in Finding of Fact X is there a suggestion that the burden is other than preponderance of the evidence.

Should there be any doubt as to the burden applied by the trial court it would be quickly dispelled upon review of the Conclusions of Law. Conclusion No. 5 correctly states what a plaintiff must show in order to prevail in a Title VII action: that she is qualified for the position she seeks and that regardless of her qualifications, she was rejected on the basis of sex or national origin. The trial court goes on to state that "'[t]he ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination.'" (Citing *Sweeney v. Board of Trustees of Keene State College,* 569 F.2d 169, 177 (1st Cir. 1978).)

In Conclusion No. 7, the trial court states that the plaintiff contends that the reasons for nonpromotion were mere pretext for discrimination:

> "The Court concludes, however, that the University's refusal to promote Professor Laborde to Full Professor was based on legitimate reasons and not because of her sex or national origin. Plaintiff has failed to convince the Court *by a preponderance of the evidence* that she was a victim of illegal discrimination. Plaintiff simply failed to prove she was qualified for promotion." (Emphasis ours.)

The legitimate reasons for nonpromotion are set forth in Conclusion No. 6:

> "There was substantial evidence that Professor Laborde's scholarship was not of the quality expected of a Full Professor at Irvine University. The individuals comprising the committees for rank promotion were in the most advantageous position to assess plaintiff's scholarly qualifications."

The Findings of Fact also reflect the underlying factual basis for the decision: Summaries from peer evaluations provided a mixed picture of plaintiff's scholarship (Finding XI); the collective academic judgment of the University that plaintiff lacked the third requirement [excellence in scholarship] for promotion (Finding X); and that "excellence in scholarship is a significant rational criterion in connection with the decision to promote" (Finding XI).

The trial court applied the preponderance of the evidence standard and the Ninth Circuit correctly upheld it.

3. The Third Question Concerning Judicial "Deference" to the University's Stated Nondiscriminatory Reason For Its Action Is Settled Contrary to Petitioner

Laborde argues that the trial court's "deference" to the University's stated reason for the action taken is clearly erroneous. She relies on *Jepsen v. Florida Board of Regents,* 610 F.2d 1379, 1383 footnote 2 (5th Cir. 1980). *Jepsen* is not inconsistent with the Ninth Circuit's decision below and Laborde mischaracterizes the trial court's consideration of deference.

Laborde's argument is based on a portion of Conclusion of Law No. 6 (Petition, Appendix E, pages 29-30). If one looks to the whole of Conclusion No. 6, the "deference" given by the trial court clearly is not erroneous. Conclusion No. 6 begins by concluding that Laborde established a prima facie case by means of statistical evidence. This is followed by the conclusion that the University met its burden in articulating legitimate, nondiscriminatory reasons for not promoting plaintiff: "There was substantial evidence that [petitioner's] scholarship was not of the quality expected of a Full Professor at Irvine University." The conclusion then observes that faculty committees are in the best position "to assess plaintiff's scholarly qualifications."

It is with regard to the *assessment of scholarly qualifications* that the court gives *"cautioned* deference," not as to the ultimate issue of whether the action of nonpromotion was discriminatory. The trial court found the University's stated reason for nonpromotion to be a legitimate reason for the action, and that plaintiff failed to convince the court that these reasons were pretext.

Laborde incorrectly argues that *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980) would produce a different result. *Jepsen* is not in conflict. It merely notes that the courts do not impose upon a Title VII plaintiff a more stringent burden of proof just because the employer is a university and the employee a professor. *Jepsen* reversed a court requirement that the plaintiff prove that the action of university officials was "a clear abuse of discretion." The courts below in the instant case did not impose such a burden. Nowhere in the findings and conclusions is there a suggestion that any standard other than "preponderance of the evidence" was imposed on the plaintiff. (See discussion with regard to burden in (2) above.) Footnote 2 of *Jepsen* cited by Laborde does not prohibit deference. Rather, it states its agreement with the Second Circuit opinion in *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1978), which stated in dicta that the nonintervention doctrine of *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), "had been pressed beyond all reasonable limits." (610 F.2d at 1383 footnote 2.) *Powell* states the court's task to be "to steer a careful course between *excessive* intervention in the affairs of the university and *the unwarranted tolerance of unlawful behavior.*" (580 F.2d at 1154, emphasis ours.)

The courts below in *Laborde* steered this careful course between excessive intervention and unwarranted tolerance. A court presses deference beyond reasonable limits when it places an undue burden on plaintiff to prove pretext. This is not the case where a court gives cautioned deference to the academic judgment of faculty peers as to the adequacy of scholarship as a legitimate articulated reason

sufficient to rebut a prima facie case.[1] Plaintiff had the burden to show this judgment to be a pretext either by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).) Laborde simply failed to meet this burden.

4. The Trial Court's Refusal to Provide Laborde Access to Confidential Academic Personnel Records Was Not An Abuse of Discretion Under the Facts Stated in Petition

It is uncontested that Laborde moved for an order to inspect confidential peer evaluations the day the case was originally set for trial. When the motion was heard at the time of trial, Laborde refused the court's offer of an *in camera* inspection. Issues such as timeliness are committed to the sound discretion of the District Court. (*Croley v. Matson Navigation Co.,* 434 F.2d 73 (5th Cir. 1970).) The Ninth Circuit correctly upheld the trial court's denial of Laborde's motion on the basis of its being untimely. (Petition, Appendix B, page 14.)

---

[1]The Second Circuit in *Powell* upheld the trial court's findings which, as in the instant case, included findings about the adequacy of plaintiff's performance as judged by faculty colleagues. It concluded that decisions were reached honestly, and because plaintiff failed to demonstrate that the reasons were pretextual, the university was to prevail.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD L. REIDHAAR
JOHN F. LUNDBERG
CHRISTINE HELWICK
MELVIN W. BEAL
Counsel for Respondent